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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554



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| In the Matter of | ) | |
| Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996 | ) | CC Docket No. 96-187 |



# REPLY COMMENTS OF AT&T CORP.

Mark C. Rosenblum
Peter H. Jacoby
James H. Bolin, Jr.

Its Attorneys

Room 3245H1
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4243

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## SUMMARY

The comments in this proceeding divide cleanly into two camps. Customers that will be required to pay the rates established in LEC tariffs filed pursuant to § 402(b)(1)(A) uniformly propose preserving the essential safeguards of the existing tariffing regime. In stark contrast, incumbent LECs argue that by enacting a two-sentence amendment to the Telecommunications Act of 1996 ("1996 Act"), Congress radically rewrote over a century of law by granting ILEC monopolists the right to set rates unilaterally. Both logic and fundamental rules of statutory construction make plain that the ILECs' position is untenable.

The non-ILEC commenters unanimously endorse the NPRM's second interpretation of § 402(b)(1)(A)'s provision that certain LEC tariffs "shall be deemed lawful" unless the Commission acts to prevent them from taking effect. Under this reading, the 1996 Act establishes a presumption during pre-effectiveness review that the relevant tariffs are lawful, but continues to impose potential liability for damages under §§ 206 and 207, unless and until the tariff in question is affirmatively found lawful by the Commission after a hearing. The Commission also retains its authority to defer, reject or suspend LEC tariff filings. However, all but one of the ILEC commenters support the NPRM's alternative interpretation, which proposes that § 402(b)(1)(A) permits ILEC monopolists to collect, without liability for damages, any rate that they file, no matter how unjust or unreasonable it is later found to be, unless the Commission suspends that rate within either 7 or 15 days. There is no basis in either the text or the legislative history of the 1996 Act for this blatantly anti-consumer construction.

A similar split between ILEC commenters and other parties is evident across almost every issue raised by the NPRM. The ILECs argue consistently that § 402(b)(1)(A) grants them plenary power to set rates, and that the Commission must abandon virtually all oversight of their tariff filings. In contrast, the non-ILEC commenters correctly point out that the 1996 Act gives no indication that Congress wished to abandon decades of tariffing practice. These parties recognize that § 402(b)(1)(A) sought to "streamline" certain filings by establishing a regime analogous to the one the Commission has in the past referred to using precisely that term. In short, that section provides for shorter notice periods and a presumption of lawfulness, much like the Commission's policy for tariff filings by non-dominant carriers or LEC rates that are within applicable price caps, but it does not provide for wholesale abdication of the Commission's fundamental mission to protect consumers' interests.

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REPLY COMMENTS OF AT&T CORP.

Pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, and its NPRM released September 6, 1996, AT&T Corp. ("AT&T") submits these reply comments concerning implementation of the LEC tariff streamlining provisions of Section 402(b)(1)(A) of the Telecommunications Act of 1996 ("1996 Act").[1]

ARGUMENT

I. TARIFFS THAT ARE "DEEMED LAWFUL" UNDER § 402(b)(1)(A) ARE NOT IMMUNE TO CLAIMS FOR DAMAGES

The non-ILEC commenters unanimously endorse the NPRM's second interpretation of § 402(b)(1)(A)'s provision that certain LEC tariffs "shall be deemed lawful" unless the Commission acts to prevent them from taking effect.[2] Under this

[1] A list of parties submitting comments and the abbreviations used to identify them are set forth in an appendix to these reply comments.

[2] NPRM, ¶ 12. See ACTA, pp. 5-8; Ad Hoc, pp. 2-3; ALTS, pp. 3-4; AT&T,

(footnote continued on next page)

reading, the 1996 Act establishes a presumption during pre-effectiveness review that the relevant tariffs are lawful, but continues to impose potential liability for damages under §§ 206 and 207, unless and until the tariff in question is affirmed by the Commission after a hearing. The NPRM's alternative interpretation, supported by all but one of the ILEC commenters,[3] suggests that the subsection radically changes the law that has long governed tariffing by permitting ILEC monopolists to collect, without liability for damages, any rate that they file, no matter how unjust or unreasonable it is later found to be, unless the Commission suspends that rate within either 7 or 15 days.[4]

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pp. 4-8; CompTel, pp. 1-3; Frontier, pp. 2-3; GSA, pp. 4-6; MCI, pp. 3-6; McLeod, pp. 2-4; MFS, pp. 6-8; Networks, pp. 3-8; Time Warner, pp. 3-6; TRA, pp. 3-7.

3 NPRM, ¶¶ 9-10. See Ameritech, pp. 6-9; Bell Atlantic, pp. 6-7; BellSouth, pp. 4-7; Cinc. Bell, pp. 4-5; GTE, pp. 9-15; NYNEX, pp. 8-12; PacTel, pp. 2-8; SW Bell, pp. 1-5; USTA pp. 3-4; US West, pp. 4-7. The only ILEC that does not support the NPRM's first proposed interpretation is Sprint, which is also the only ILEC commenter that derives the majority of its revenue from activities for which it must purchase tariffed services from other incumbent LECs. See Sprint, pp. 3-4.

4 As AT&T showed in its comments, the notice periods established in § 402(b)(1)(A) are applicable only to incumbent LECs. See AT&T, p. 4 n.7. All commenters that address the issue agree that the 1996 Act's tariffing provisions were not intended to lengthen existing filing periods, such as the one-day's notice currently prescribed for non-dominant carriers. See NPRM, ¶¶ 41-42; AT&T, p. 4 n.6; Time Warner, p. 3; Sprint, p. 9 (arguing current filing periods should not be lengthened); Cinc. Bell, p. 2 (same). Ameritech states at page 15 of its comments that "§ 204(a) applies equally to all carriers," but appears to refer only to the effect of § 402(b)(1)(A)'s "deemed lawful" provision.

AT&T and other non-ILEC commenters recognize that the Communication's Act's tariffing regime is based upon more than a century of judicial and regulatory decisions interpreting similar laws.[5] Longstanding statutes require common carriers to file tariffs with the Commission specifying the terms on which they will provide service. By law these rates must be charged to all customers, without exception. Customers are, in turn, required to pay the filed rates. However, unless the Commission affirmatively approves a rate, a carrier remains liable for damages if a customer can demonstrate that the tariffed rate is unjust or unreasonable. Merely permitting a tariff to take effect without suspension does not amount to a finding that it is reasonable; such a finding must be made after a hearing conducted pursuant to § 205. Even prior to the enactment of this nation's first tariffing statute in the 1870s,[6] the common law similarly provided for reparations when carriers charged rates that were found to be unreasonable.[7] Congress was well aware of this venerable line of authority when it enacted § 402(b)(1)(A). The Commission may not assume that the legislature made substantial changes to the tariffing regime unless the 1996 Act contains clear language to that effect.

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5 See AT&T, pp. 3, 5; CompTel, p. 2; Networks, p. 4; Time Warner, p. 5.

6 The first national tariffing statute was the Interstate Commerce Act of 1877. Courts interpreting the tariffing provisions of the Communications Act routinely look for guidance to cases interpreting that earlier statute. See, e.g., MCI v. AT&T, 114 S. Ct. 2223, 2231 (1994).

7 See, e.g., Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370, 383 (1932); Time Warner, p. 5 (noting that statutes that derogate common law rights must be strictly construed).

Far from clearly indicating an intent to eliminate customers' time-honored right to obtain reparations, the 1996 Act is completely silent on the issue of damages. As AT&T showed in its comments, § 402(b)(1)(A) merely amends the section of the Communications Act that addresses the Commission's power to suspend tariff filings.[8] Section 402(b)(1)(A) simply places a time limit on the Commission's deliberations over whether to suspend a tariff. Under that section, if the Commission does not suspend a filing within 7 or 15 days, or defer or reject the tariff in question, then it must allow it to take effect; although it may convene a hearing at a later date and assess damages as appropriate based upon its findings. The 1996 Act in no way modifies the statutory provisions governing the Commission's power to entertain complaints, to award damages, or to defer or reject tariff filings.[9]

AT&T strongly supports two further arguments raised by non-ILEC commenters. MCI correctly observes that if LEC tariffs allowed to take effect pursuant to § 402(b)(1)(A) were immune from claims for damages, then petitioners would have the right to seek judicial review of Commission decisions not to suspend those tariffs. Such decisions would constitute final agency action because they would be substantively equivalent to a decision reached after a § 205 hearing.[10]

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8 See AT&T, pp. 2-4.

9 See NPRM, ¶¶ 12-13; 47 U.S.C. §§ 201, 203, 206-208; AT&T, p. 8.

10 See MCI, pp. 6-9. If the Commission were to adopt the NPRM's first proposed interpretation of § 402(b)(1)(A), then in order to survive judicial review of a decision not to suspend a tariff filed under that section, the Commission would be required to issue a written explanation that was sufficiently detailed to permit a

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Also, in their joint comments, Capital Cities/ABC, CBS, NBC, and TBS (the "Networks") observe that § 402(b)(1)(A) provides that certain LEC tariffs "shall be deemed lawful" upon filing; however, such tariffs are not "effective" until a minimum of 7 or 15 days later.[11] If, as the ILEC commenters contend, by using the phrase "deemed lawful" Congress intended that certain tariffs become the legal equivalent of a rate approved by the Commission, then § 402(b)(1)(A) is impossibly self-contradictory. Decades of Supreme Court decisions hold that a common carrier must collect, and its customers must pay, the "lawful rate."[12] However, a LEC cannot charge a tariffed rate before it becomes effective. It is thus simply impossible for a LEC tariff to be the "lawful" rate before it takes effect.

Even a brief review of the ILEC commenters' proposed interpretation of § 402(b)(1)(A) reveals that their position is patently untenable. The ILECs argue that this subsection of the 1996 Act radically rewrites not only over a century of legal precedent, but also the very rationale for tariffing. Whereas tariff regimes formerly existed to protect consumers from unjust charges imposed by monopolists, the ILECs contend that the 1996

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court of appeals to at least discern a "rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto Ins., 463 U.S. 29, 43 (1983) (citation omitted).

11 See Networks, pp. 5-6; compare, e.g., PacTel, p. 5 (arguing ILEC tariffs are "lawful" when filed).

12 See, e.g., Arizona Grocery, 284 U.S. at 384.

Act grants them the right to collect whatever rate they choose to set. Moreover, for the first time in history customers are purportedly forbidden from obtaining retroactive reparations when ILECs' tariffed charges are found to be unjust or unreasonable. However, as the ILECs would have it, carriers that participate in markets that currently enjoy robust competition continue to be liable for such damages.

The clearest argument against the ILECs' interpretation of § 402(b)(1)(A) is the shocking inequity of their proposals. Indeed, the ILECs do not even attempt to explain why Congress might have chosen to permit them to retain profits earned via charges that are unreasonable or unjust.[13] Nevertheless, the ILEC commenters seek to extend their supposed immunity from damages actions as far as possible. For example, some ILECs argue that the Commission should not review their filings before they take effect, but should simply require customers to pay the tariffed rates, without hope of obtaining reparations, until such time as those rates are overturned in a complaint proceeding.[14] The majority of ILECs also contend that § 402(b)(1)(A) strips the

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[13] BellSouth suggests that ILECs would continue to be subject to the Commission's power to levy fines and forfeitures. See BellSouth, p. 13. However, to impose a fine or forfeiture would require proof that a specific individual acted "willfully and knowingly." 47 U.S.C. §§ 501, 502. Not only would this standard be difficult to meet, such penalties would not serve to return any monies to customers that had been subjected to unjust charges.

[14] See Cinc. Bell, p. 10; PacTel, p. 5; SW Bell, p. 17.

Commission of its authority to reject ILEC tariff filings that are facially noncompliant with applicable laws or regulations.[15]

Unable to muster any legal precedent or legislative history to support their asserted right to set prices unilaterally,[16] the ILECs instead advert to the deregulatory and procompetitive goals of the 1996 Act, and argue that competition in local markets will ensure that their prices are not set at levels that would be unjust or unreasonable.[17] However, these arguments do not account for the fact that although the 1996 Act seeks to permit full and fair competition for local exchange services to develop, at present the ILECs enjoy effective monopolies, and are rightly regarded by the Commission as possessing significant market power.[18] The ILECs argue that, despite their current monopoly power, the Commission should simply treat them as if they were in fact participating in competitive markets and assume that they will price their services accordingly.[19] The ILECs do not explain, however, why Congress might have elected to

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15 Bell Atlantic, p. 5; BellSouth, p. 14; Cinc. Bell, p. 12; NYNEX, p. 20; PacTel, p. 19; SW Bell, p. 14; USTA p. 10.

16 Several ILECs offer interpretations of § 402(b)(1)(A)'s "deemed lawful" provision based on selective readings from Black's Law Dictionary, see, e.g., Ameritech, p. 9, or simply assert that the meaning of the phrase is somehow "clear," see GTE, p. 10; NYNEX, p. 9. However, as the NPRM concludes, dictionary definitions of "deem" are inconclusive. See NPRM, ¶ 10; AT&T, p. 6 n.13.

17 See, e.g., AllTel, p. 2; PacTel, p. 5.

18 See, e.g., Ad Hoc, p. 3; ALTS, p. 4; AT&T, p. 7; MCI, pp. 10-11; Networks, p. 7; TRA, p. 4.

permit the only remaining monopolists in the nation's telephony markets to establish tariffed rates for which damages are not available, while retaining that remedy for rates set by common carriers that face real competition.

Indeed, the ILECs' arguments at times they seem almost Orwellian. For example, US West contends that "There is nothing at all unusual or troubling about a customer not being able to challenge on a retroactive basis the price paid for goods and services."[20] But such a policy certainly would be "unusual" -- in fact, it would be unprecedented in the history of the nation's tariffing laws, and would be an equally unprecedented departure from ordinary principles of commercial law.[21] US West's proposal is "troubling" as well, given that monopolists providing an essential service would be permitted to set unilaterally the rates that their customers would be required by law to pay. PacTel argues that the regime the ILECs propose "closely models the free marketplace ...."[22] However, in a competitive market, buyers can negotiate with multiple sellers for the most favorable package of terms. PacTel proposes a world in which it is

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19 See, e.g., GTE, p. 5 (extensive deregulation of ILEC tariffing required "regardless of the actual level of competition in the marketplace"); USTA, p. 13 ("the current competitive environment" dictates that LECs not be required to file cost support with their tariffs).

20 US West, pp. 4-5.

21 In ordinary commercial transactions, buyers can indeed make retroactive challenges to a seller's unilateral increase in the price of goods or services.

22 PacTel, p. 7.

invested by law with what is, in effect, the exclusive power to determine the rates its customers must pay.

The non-ILEC commenters agree unanimously that the only reasonable interpretation of "deemed lawful" as that phrase is used in § 402(b)(1)(A) is that it serves to establish a higher burden for pre-effectiveness suspension of LEC tariff filings, as suggested in paragraph 12 of the NPRM. Section 402(b)(1)(A) sought to "streamline" certain filings by establishing a regime analogous to the one the Commission has in the past referred to using precisely that term. In short, that section provides for shorter notice periods and a presumption of lawfulness, much like the Commission's policy for tariff filings by non-dominant carriers or LEC rates that are within applicable price caps.[23]

The non-ILEC commenters that address the issue agree that the Commission should implement § 402(b)(1)(A) by establishing a procedure analogous to the four-part test it now requires under 47 C.F.R. § 1.773 for suspension of tariff filings by non-dominant carriers.[24] These commenters also agree that because ILECs retain significant market power, and thus present a greater potential threat to impose unreasonable rates, petitioners challenging a tariff filed pursuant to § 402(b)(1)(A) should be required to show only that it is "more likely than not" that the disputed tariff is

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23 NPRM, ¶ 12. See, e.g., AT&T, pp. 7-8; MCI, pp. 3-5; Networks, p. 3.

24 See AT&T, pp. 7-8; KMC, p. 7; MCI, p. 11; McLeod, p. 4; MFS, p. 8.

unlawful, or to make a similar showing that is less stringent than § 1.773's requirement that a petitioner show "a high probability" that the tariff will be found unlawful.[25]

## II. THE COMMISSION RETAINS ITS AUTHORITY TO DEFER TARIFFS FILED PURSUANT TO § 402(b)(1)(A) FOR UP TO 120 DAYS

The non-ILEC commenters that address the issue agree that the Commission retains its power to defer ILEC tariff filings,[26] while the ILECs argue that the Commission may no longer defer their tariffs.[27] As AT&T showed in its comments, there is simply no evidence that Congress intended to alter the Commission's deferral power. Section 402(b)(1)(A) did not amend § 203 of the Communications Act in any way, but instead simply set a time limit on the Commission's deliberations as to whether to suspend or defer certain ILEC filings. Moreover, there is no reason to presume that Congress would have sought to eliminate deferrals only for those telephony markets in which there is at present no competition, while allowing the Commission to retain that power for other filings.[28]

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25 See id.

26 See ACTA, p. 1; AT&T, pp. 1-4; Networks, p. 5 n.3; see also MCI, pp. 2-3 (arguing deferral power foreclosed only for filings seeking increases or decreases in rates for existing services).

27 See AllTel, p. 3; Ameritech, p. 5; Bell Atlantic, p. 5; BellSouth, pp. 3-4; Cinc. Bell, p. 4; GTE, pp. 7-8; NYNEX, p. 7; Sprint, p. 2; SW Bell, p. 2; USTA p. 3; US West, p. 17.

28 At a minimum, the Commission should adopt the interpretation proposed by MCI and hold that its deferral power is foreclosed only for LEC filings seeking increases or decreases in rates for existing services. See MCI, pp. 2-3, 15.

## III. SECTION 402(B)(1)(A) SPECIFIES 7- AND 15-DAY "STREAMLINED" FILING ONLY FOR LEC TARIFF FILINGS SEEKING TO INCREASE OR DECREASE RATES FOR EXISTING SERVICES

The comments again display a stark division between ILECs and non-ILECs over the issue of notice periods for various types of ILEC tariff filings. The non-ILEC commenters agree unanimously that § 402(b)(1)(A) applies only to tariffs for existing services.[29] The ILECs argue that they must be permitted to file tariffs for new services on either 7 or 15 days notice, generally on the grounds that it is in their customers' best interest that new services reach the market as rapidly as possible.[30] It is remarkable, however, that not one of the ILECs' customers filing comments in this proceeding endorses this view. Instead, these customers are far more concerned that the Commission continue to oversee ILEC tariff filings so as to prevent potential abuses.

Because of their concern that ILECs will abuse their market power, the non-ILEC commenters also urge the Commission to construe § 402(b)(1)(A) narrowly. The only difference of opinion among non-ILECs on this issue concerns whether "streamlined" filing applies only to rate increases and decreases,[31] or to changes in other

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29 NPRM, ¶ 18. See Ad Hoc, p. 4; AT&T, pp. 9-10; CompTel, p. 3; GSA, p. 7; KMC, p. 4; MCI, p. 15; MFS, p. 2; TRA, p. 7. Sprint also breaks ranks with the other ILECs on this point. See Sprint, p. 4.

30 AllTel, p. 3; Ameritech, p. 11; Bell Atlantic, pp. 2-3; Cinc. Bell, p.7; GTE, p. 15; NECA, p. 5; NYNEX, p. 13; PacTel, p. 9; SW Bell, p. 6; US West, p. 9.

31 NPRM, ¶ 17. See ALTS, p. 4; Frontier, p. 3; McLeod, p. 4; Time Warner, p. 6.

terms and conditions as well.[32] As AT&T stated in its comments, § 402(b)(1)(A) does direct the Commission to streamline its review of LEC tariff filings changing terms other than rates.[33] However, that section leaves to the Commission's expert discretion the particular notice periods appropriate for such filings, specifying only 7- and 15-day notice for rate changes. For tariff filings changing terms other than rates, AT&T proposes that the Commission require that a LEC file 30 days prior to a tariff's proposed effective date.

The non-ILECs also agree that ILEC tariffs proposing both rate increases and decreases must be filed on 15 days notice.[34] Any other approach would permit ILECs to avoid the 15-day notice period Congress mandated for rate increases simply by combining multiple rate changes in a single filing. The ILEC commenters contend that rate increases and decreases contained in each filing should be aggregated, and a 7- or 15-day notice period imposed based upon their net effect.[35] This proposal is plainly unreasonable. Customers do not necessarily purchase all elements of any given tariff filing, nor do they purchase different elements in equal quantities. Whether a given filing containing multiple rate changes results in a net increase or decrease will vary widely by

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32 See Ad Hoc, p. 5; ALTS, p. 6; AT&T, pp. 9-10; KMC, p. 4; MCI, pp. 14-15; MFS, pp. 3-4.

33 AT&T, pp. 9-10.

34 NPRM, ¶ 26. See Ad Hoc, p. 8; AT&T, p. 10 n.20; CompTel, p. 7; GSA, p. 13; MCI, p. 20; McLeod, p. 5; Networks, p. 10; TRA, p. 12.. BellSouth also endorsed this interpretation of § 402(b)(1)(A). See BellSouth, p. 14.

35 NPRM, ¶¶ 22-24. See AllTel, p. 6; Cinc. Bell, pp. 12-13; NYNEX, p. 21; PacTel, p. 20; SW Bell, p. 15; USTA p. 11.

customer. Further, the ILECs' proposal would permit them to combine increases and decreases strategically, and thereby ensure that their customers are routinely denied the benefit of the 15-day review period mandated by Congress.

## IV. THE COMMISSION SHOULD CONTINUE TO CONDUCT PRE-EFFECTIVENESS REVIEWS OF LEC TARIFFS FILED PURSUANT TO § 402(B)(1)(A), AND SHOULD MODIFY ITS PROCEDURES TO FACILITATE THAT REVIEW

The non-ILEC commenters agree that the Commission should not abandon pre-effective review of ILEC tariffs filed pursuant to § 402(b)(1)(A).[36] In light of ILECs' substantial market power, it is crucial that the Commission continue to protect customers from unjust or unreasonable tariffs through pre-effectiveness reviews. In order to facilitate review of ILEC filings under § 402(b)(1)(A), the non-ILEC commenters also urge the Commission to adopt its proposal to require that tariffs filed pursuant to that section be accompanied by a detailed description of any changes in the terms and conditions of the tariff and their potential impact on customers, as well as an analysis demonstrating that the tariff is lawful under current Commission rules.[37] The non-ILECs also strongly support the Commission's proposal to designate by rule certain categories of

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[36] See ALTS, pp. 6-7; AT&T, pp. 11-12; CompTel, pp. 6-7; Frontier, pp. 5-6; GSA, pp. 10-12; KMC, p. 9; MCI, pp. 16-19; McLeod, p. 2; MFS, p. 12; Networks, pp. 8-11; TRA, pp. 10-11.

[37] See, e.g., Ad Hoc, p. 8; AT&T, p. 12; GSA, p. 12; McLeod, p. 5; Time Warner, p. 8; TRA, p. 11.

tariffs that would be presumptively subject to deferral or suspension, such as those that are facially noncompliant with price cap rules or other Commission regulations.[38]

The question of pre- versus post-effectiveness review is the only matter upon which there is substantial disagreement among the ILEC commenters. The majority urges the Commission to conduct pre-effectiveness reviews.[39] A few ILECs argue that their tariffs should take effect without review, despite the fact that they contend that their customers could not obtain reparations if a tariff is later found to be unjust or unreasonable.[40] The ILECs also uniformly oppose any requirement that they file additional information or legal analyses supporting their tariffs,[41] and argue that the Commission may not reject or suspend even tariffs that appear on their face not to comply with its regulations.[42]

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38 NPRM, ¶ 25. See CompTel, p. 6; KMC, p. 9; MCI, pp. 19-20; MFS, pp. 11-12; TRA, p. 11.

39 See AllTel, p. 5; Ameritech, pp. 13-14; Bell Atlantic, p. 4; BellSouth, p. 11; NYNEX, p. 19; SW Bell, p. 11; USTA p. 9.

40 See Cinc. Bell, p. 10; NECA, pp. 2-4; PacTel, p. 5; SW Bell, pp. 11, 17 (arguing Commission should eliminate both pre- and post-effectiveness review).

41 See AllTel, p. 5; Ameritech, p. 26 (information requirement unnecessary, but acceptable; legal analysis requirement unacceptable); Bell Atlantic, p. 7; BellSouth, p. 12; Cinc. Bell, p. 11; GTE, p. 22; NECA, p. 5; SW Bell, p. 13; USTA p. 10; US West, p. 15.

42 Bell Atlantic, p. 5; BellSouth, p. 14; Cinc. Bell, p. 12; NYNEX, p. 20; PacTel, p. 19; SW Bell, p. 14; USTA p. 4; USTA p. 10.

The ILECs argue that they may not be required to file additional information with their tariffs on the grounds that § 402(b)(1)(A) was intended to "streamline" tariff filings, and the Commission therefore may not do anything that might require them to provide more data to facilitate expedited review. It is plain, however, that reducing the required notice periods for tariff revisions does represent substantial "streamlining," even if accompanied by minor additional information requirements. The Commission has the authority to obtain the information that it believes is necessary to safeguard the public interest in an environment in which ILECs may file certain tariffs on as little as 7 days notice. It is unreasonable to contend that no effort to reduce the overall regulatory burden on ILECs may require slight increases in the burden posed by some components of the Commission's rules.[43]

The ILECs object to the NPRM's proposed legal analysis requirement on the grounds that it impermissibly shifts the burden of proving the lawfulness of their filings back to them. This claim is simply incorrect. A tariff filing that did not include a legal analysis would be rejected not because the ILEC had not proved it was lawful, but because the filing would be incomplete under the Commission's regulations. If anything, the Commission's proposal would give ILECs an advantage by permitting them to present

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[43] It is also important to note that any burden imposed by the Commission's proposed additional information and legal analysis requirements would be slight. The ILECs argue that petitioners seeking to challenge their tariffs can adequately prepare the requisite materials in as little as one day. See US West, pp. 17-18. Thus, ILEC employees, who will already be very familiar with their companies' tariffs, should be able to prepare materials to support their filings with minimal effort.

their views early in the tariff review process, thus forestalling the possibility that the Commission might be forced to defer a tariff filing in order to consider fully an ILEC's response to a petitioner's claims that a tariff was unlawful.

Finally, the ILECs' opposition to the Commission's proposal to reject tariff filings that are facially noncompliant with its regulations is simply inexplicable. There can be no question that the Commission retains the authority to reject or suspend noncompliant tariffs filed pursuant to § 402(b)(1)(A) (and, the non-ILECs contend, the authority to defer them as well). By promulgating rules to that effect, the Commission would simply be establishing guidelines to aid ILECs and petitioners in anticipating how it will interpret its own tariffing regulations.

## V. THE COMMISSION SHOULD REQUIRE ADVANCE FILING OF TRP AND COST SUPPORT DATA

One of the NPRM's most important proposals for pre-effectiveness review of ILEC tariff filings pursuant to § 402(b)(1)(A) is to require LECs to file their tariff review plan ("TRP") materials and cost support data in advance of their annual access tariff filings. AT&T and the non-ILEC commenters strongly support this proposal.[44] As AT&T showed in its comments, TRPs and cost support data should also be provided in advance of any mid-term change to ILECs' price cap indices.

The ILEC commenters object to the Commission's proposal on the grounds that TRP and cost support information that does not include proposed rates either

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[44] NPRM, ¶¶ 30-31. See AT&T, pp. 16-18; CompTel, p. 7; Frontier, pp. 4-5; GSA, p. 15; MCI, pp. 27-28; TRA, p. 13.

will not be useful, or cannot be generated.[45] It is impossible to credit this claim, however, given that Ameritech and Sprint agree that at least some parts of the TRP can be completed and would contain information of value to potential petitioners.[46]

Moreover, the non-ILEC commenters' strong interest in obtaining these data in advance of annual access tariff filings belies any claim that such information would not be useful in monitoring tariffing practices. The chief purposes of TRPs and cost support data are (i) to justify LECs' exogenous costs, (ii) establish price caps, and (iii) verify that proposed rates are within the established price caps. The first two of these three goals can be accomplished without requiring ILECs to provide their proposed rates. ILECs' proposed rates play no role in the calculation of exogenous costs. In addition, price cap indices ("PCIs") used to set caps on LECs' proposed rates -- including basket PCIs, upper and lower limits of sub-band indices ("SBIs") and the carrier common line ("CCL") rate cap[47] -- can be calculated without specifying proposed rates. The ILEC

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45 See BellSouth, p. 17; GTE, p. 8; PacTel, p. 24; SW Bell, p. 20; USTA, p. 14; US West, pp. 16-17.

46 See Ameritech, pp. 27-28 (arguing that limited TRP information should be filed 25 days in advance of filing); Sprint, p. 8 (exogenous cost changes and PCI development should be filed 15 days in advance of annual access tariff).

47 LECs' proposed end-user common line ("EUCL") rates are also part of the CCL rate cap calculation in their annual filings. To establish their proposed EUCL rates, LECs must follow a precise formula which requires them to forecast their base factor portion ("BFP") revenue requirement and number of subscriber lines for the next rate period. See 47 C.F.R § 69.104. Once these forecasts are made, EUCL rates are defined by simple mathematical formula prescribed by the Commission's rules. Since EUCL rates do not involve business judgments, but are simply derived from other, non-rate data which LECs must report, the Commission should require the LECs to provide the current TRP CCL-1 Form (excluding line

(footnote continued on next page)

commenters thus cannot claim in good faith that the Commission's proposal to require advance submission of TRPs and cost support data will not provide meaningful information.

AT&T also demonstrated in its comments that there was no basis to adopt shorter notice periods for TRP and cost support data filings by rate-of-return LECs' than those proposed for price cap LECs.[48] Although they oppose requiring filing of TRP materials in advance of annual access tariffs, both PacTel and Southwestern Bell agree that there are no differences between these two classes of LECs that support establishing different timetables for advance filing of their TRPs and cost support data.[49]

## VI. THE COMMISSION SHOULD REJECT THE ILECs' ADDITIONAL PROPOSALS

Paragraph 29 of the NPRM seeks comment on whether the Commission should impose a standard protective order whenever a carrier claims in good faith that information supporting a tariff qualifies as confidential under relevant Commission precedent. The ILEC commenters support this proposal, with some even arguing that the public should never have access to such data, even under a protective order.[50] The non-

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490, the proposed premium terminating rate) in advance of LECs' annual tariff filings and any mid-term filings that revise the common line basket PCI.

48 NPRM, ¶ 31. See AT&T, p. 18.

49 See PacTel, pp. 24-25; SW Bell, p. 21.

50 See Ameritech, pp. 20-23; Bell Atlantic, pp. 8-9; BellSouth, p. 16; Cinc. Bell, p. 15; NYNEX, pp. 23-24; SW Bell, p. 19.

ILEC commenters, however, oppose the use of "form" protective orders, and the relevant law clearly supports their position.[51] Although Freedom of Information Act ("FOIA") exemption 4 protects certain trade secrets and financial data from disclosure, it is well-settled that an agency invoking a FOIA exemption bears the burden of establishing its right to withhold information from the public.[52] Thus, the Commission cannot simply accept a submitting party's assertions that tariff support materials are confidential. Moreover, even data that are subject to a valid, judicially enacted protective order are not automatically covered by exemption 4; an agency still must demonstrate that the information in question is exempt from FOIA disclosure.[53]

Finally, several ILECs attempt to argue that § 402(b)(1)(A) represents a congressional mandate to restructure LEC tariffing in various ways, such as by eliminating Part 69 waivers or the requirement that cost support be included in tariff filings.[54] However, there is no evidence that § 402(b)(1)(A) was intended to do anything other than reduce notice periods and establish a presumption of lawfulness for certain ILEC tariffs.

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51 See, e.g., Ad Hoc, p. 11; AT&T, p. 19; GSA, p. 14; MCI, pp. 24-27.

52 See, e.g., Senate of Comm. of Puerto Rico v. United States Dept. of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987); Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 861 (D.C. Cir. 1980).

53 See Burka v. United States Dept. of HHS, 87 F.3d 508, 517 n.10 (D.C. Cir. 1996); Anderson v. United States Dept. of HHS, 907 F. 2d 936, 945 (10th Cir. 1990).

54 See, e.g., AllTel, p. 6; Ameritech, pp. 18-20; Cinc. Bell, p. 8; GTE, p. 24-26; NYNEX, p. 6; SW Bell, pp. 22-23; USTA, pp. 6, 13,16.

Nothing in the limited text of that section or its legislative history suggests that the Commission must embark on the sweeping program these commenters advocate. At a minimum, the Commission cannot adopt such radical changes to its current rules without allowing interested parties an adequate opportunity to comment. Forcing non-ILECs to respond only via some fraction of the 20 pages the Commission has allowed for reply comments in the instant proceeding clearly would not be sufficient.

## CONCLUSION

For the reasons stated above and in AT&T's comments, the Commission's proposed rules implementing the LEC tariff streamlining provisions of § 402(b)(1)(A) should be modified prior to adoption.

Respectfully submitted,

AT&T CORP.

By _____

Mark C. Rosenblum
Peter H. Jacoby
James H. Bolin, Jr.

Its Attorneys

Room 3245H1
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4243

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LIST OF COMMENTERS
CC Docket 96-187

Ad Hoc Telecommunications Users Committee ("Ad Hoc")

AllTel Telephone Services Corporation ("AllTel")

America's Carriers Telecommunications Association ("ACTA")

Ameritech Operating Companies ("Ameritech")

Association for Local Telecommunications Services ("ALTS")

AT&T Corporation ("AT&T")

Bell Atlantic Telephone Companies ("Bell Atlantic")

BellSouth Corporation and BellSouth Telecommunications, Inc. ("BellSouth")

Capital Cities/ABC, Inc.; CBS, Inc.; National Broadcasting Company, Inc.; and Turner Broadcasting System, Inc. ("Networks")

Cincinnati Bell Telephone Company ("Cinc. Bell")

Communications Image Technologies, Inc.

Competitive Telecommunications Association ("CompTel")

Frontier Corporation ("Frontier")

General Services Administration ("GSA")

GTE Service Corporation ("GTE")

National Exchange Carrier Association, Inc. ("NECA")

KMC Telecom, Inc. ("KMC")

MCI Telecommunications Corp. ("MCI")

McLeod Telemanagement, Inc. ("McLeod")

MFS Communications Company, Inc. ("MFS")

NYNEX Telephone Companies ("NYNEX")

Pacific Telesis Group ("PacTel")

Southwestern Bell Telephone Company ("SW Bell")

Sprint Corporation ("Sprint")